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MOHAMMAD NAJIB TUN HJ ABDUL RAZAK v. THOMAS THOMAS K THOMAS & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD BACHE J
[SUIT NO: WA-21NCvC-193-10-2021]
B 28 FEBRUARY 2023

Abstract – *The process of bringing anyone to justice will have to go through several stages with the Malaysian criminal justice system. Because of the rigid process in the criminal justice system, with an inbuilt 'check and balance' mechanism/procedure, the fate of the person charged is not dependent on the acts or conducts of the Public Prosecutor but on the strength of the evidence adduced before the trial judge.*

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D ***TORT:*** *Misfeasance in public office – Attorney General/Public Prosecutor – Conducts and actions of Attorney General ('AG')/Public Prosecutor ('PP') – AG/PP preferred 35 charges against plaintiff in four cases – Allegation that AG/PP did not exercise power for authorised purpose but for own agenda – Interference in investigation and attempt to prejudice – Whether AG/PP committed misfeasance in public office*

E

TORT: *Abuse of process – Malicious process – Conducts and actions as Attorney General ('AG')/Public Prosecutor ('PP') – AG/PP preferred 35 charges against plaintiff in four cases – Allegation that AG/PP did not exercise power for authorised purpose but for own agenda – Interference in investigation and attempt to prejudice – Whether prosecution done in bad faith – Whether there was malicious process*

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TORT: *Negligence – Attorney General/Public Prosecutor – Conducts and actions as Attorney General ('AG')/Public Prosecutor ('PP') – AG/PP preferred 35 charges against plaintiff in four cases – Allegation that AG/PP did not exercise power for authorised purpose but for own agenda – Interference in investigation and attempt to prejudice – Whether there was negligence*

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CIVIL PROCEDURE: *Striking out – Application for – Claim against Attorney General ('AG')/Public Prosecutor ('PP') – AG/PP preferred 35 charges against plaintiff in four cases – Allegations that AG/PP had committed torts of misfeasance in public office, malicious process and negligence – Whether claim disclosed cause*

H *or reasonable cause of action – Whether claim obviously unsustainable – Whether claim scandalous, frivolous, vexatious and abuse of court's process – Whether claim ought to be struck out – Rules of Court 2012 O. 18 r. 19(1)(a), (b) & (d)*

The plaintiff had filed a civil claim against Thomas Thomas ('TT'), former Attorney General ('AG')/Public Prosecutor ('PP') of Malaysia, as the first

I defendant and the Government of Malaysia as the second defendant. However, the claim against the Government of Malaysia was dropped and TT remained as the sole defendant. This suit was premised solely on the

conducts and actions of TT as the AG/PP where it was contended that he (i) did not exercise his power for the authorised purpose but for his own agenda as he had allegedly interfered in the investigation and attempted to prejudice and suppress the plaintiff; (ii) had committed misfeasance in public office; (iii) had maliciously used the legal process against the plaintiff to further political aims; and (iv) was negligent in his duties as the AG. The plaintiff submitted that TT, whilst holding his public office as the PP/AG had committed the three torts by, amongst others, prejudging the plaintiff and had preferred 35 charges against him in four cases with bad faith. According to the plaintiff, TT had personally targeted or formed an opinion against the plaintiff even before he became the AG/PP as early as in 2012. All these could be found in TT's memoir/book, *My Story: Justice in the Wilderness* which was published in January 2021. TT applied to strike out the plaintiff's claim, under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 ('ROC'), on the grounds that (i) there was no cause or no reasonable cause of action and it was conspicuously clear that the claim, on the face of it, was obviously unsustainable; (ii) as the PP, TT was conferred a wide discretion and enjoyed immunity from any proceedings against him; (iii) the plaintiff's claims were scandalous, frivolous, vexatious and an abuse of the court's process. The three causes of action *ie*, misfeasance in public office, malicious abuse of process and negligence/recklessness were all related to TT's exercise of his discretion to prefer the 35 charges against the plaintiff in the four cases.

Held (allowing defendant's application; striking out plaintiff's claim):

(1) Under art. 145(3) of the Federal Constitution ('FC'), the AG/PP was conferred the power to exercise at his discretion to institute, conduct or discontinue any proceeding for criminal offences. Under art. 145(3), the AG/PP has the power to charge any person, to reduce the charge, to increase the charge or withdraw the charge against any person already charged. As the discretion of the AG/PP was almost unfettered, the causes of action for malfeasance, malicious process and negligence did not arise in the first place. As TT was protected and immune from any proceedings by virtue of the discretionary powers accorded to him, the plaintiff's claim should be struck out as there was no reasonable cause of action. To not allow the claims to be struck out would be akin to not recognising the discretionary powers granted by the FC, which is the supreme law of the land and going against the spirit of that special article. (paras 35, 36, 44 & 45)

(2) That the PP or TT did not commit the three torts could be further seen in the various processes of bringing one to justice, which is rigorous. The AG/PP had to undergo several stages. It entailed a somewhat built in 'check and balance' procedure/mechanism, which would not cause nor never will cause TT to commit the tort of misfeasance, malicious process and negligence. The built in 'check and balance' procedure/

A mechanism would show that at the end of the day, the fate of the plaintiff would be determined by the courts and not TT as the PP. It actually hinged on the strength of the evidence adduced, which was earlier gathered by the investigating agencies independently, by the PP before the trial judge. (paras 56 & 57)

B **(3)** For a tort of misfeasance and malicious process to exist, the defendant must have conducted or been involved in the prosecution/proceeding until the conclusion of the trial. However, in the present case, at the time when this suit was filed in 2021, the prosecution of the 35 charges in the four cases had not started and/or were still ongoing or pending and TT C had already retired/resigned on 28 February 2020. Hence, he was not and would not be involved in the conduct of the proceedings of the 35 charges in the four cases in the first place and there was no final determination on the four cases as yet. (paras 79 & 80)

D **(4)** The pleadings failed to disclose any cause(s) of action by virtue of the discretionary powers conferred upon TT under art. 145(3) of the FC and TT did not conduct the prosecution of the four cases. There was no cause or reasonable cause of action. Consequently, this was a plain and obvious case where on the face of it, the claims were obviously unsustainable and should be struck out under r. 19(1)(a). (paras 54 & 55)

E **(5)** Based on the pleadings and the affidavits, the plaintiff's claims were not well founded and in fact were misleading and hence, the claims were frivolous, scandalous, vexatious and should be struck out. This was because the plaintiff had averred that TT had deliberately targeted the plaintiff and charged the plaintiff without proper investigation. This, the F plaintiff failed to explain and to plead sufficiently. (paras 73 & 74)

(6) The act of the plaintiff in filing these claims could be seen as a collateral attack on the prosecution of the 35 criminal charges in four criminal cases against him. This was because the plaintiff was prematurely launching a civil action based on criminal charges which have yet to be G determined in the criminal court. This in itself was an abuse of the court's process as to allow these claims might give rise to potentially the four criminal cases to be tried on a civil balance of proof. This claim should not be filed at all before the trials of the four cases were completed. It was akin to putting the cart before the horse. It had also H created confusion and transgression of jurisdictions between the civil and criminal court's jurisdiction and this should not be allowed at all costs. (para 88)

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Case(s) referred to:

Abdul Hamid v. PP [1956] 1 LNS 3 HC ***(refd)***
Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors [1996] 3 CLJ 695 HC ***(refd)***
Godrej Sara Lee Ltd v. Siah Teong Teck & Anor [2007] 10 CLJ 255 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2007] 5 CLJ 118 HC ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 4 CLJ 705 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abd Razak v. PP [2022] 6 CLJ 27 CA ***(refd)***
Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors [2006] 8 CLJ 114 HC ***(refd)***
Johnson Tan Han Seng & Other Appeals v. PP [1977] 1 LNS 38 FC ***(refd)***
Law v. Llewellyn [1987] 1 KB 487 ***(refd)***
Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***
Malayan United Finance Bhd v. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601 HC ***(refd)***
Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***
Muhammad Kadar v. PP [2011] 3 SLR 1205 ***(refd)***
New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***
R v. Banks [1916] 2 KB 621 ***(refd)***
R v. Horsham Justices, ex parte Farquharson and Anor [1982] 2 All ER 269 ***(refd)***
Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Roncarelli v. Duplessis [1959] SCR 121 ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
Sidhartha Vashist @ Manu Sharma v. State (NCT of Delhi) (2010) ***(refd)***
Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***
Three Rivers [2003] 2 AC 1 ***(refd)***
Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 107, 112, 178, 182, 376
Federal Constitution, arts. 8, 145(3)
Malaysian Anti-Corruption Commission Act 2009, ss. 29, 30
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), (2)
Subordinate Courts Act 1948, s. 107

Other source(s) referred to:

Mallal's Criminal Procedure, 7th edn, pp 385-397

For the plaintiff - Firoz Husein Ahmad Jamaluddin, Yudistra Danona Dorai, AW Kai Xiang, Audrey Lim Shu Ting & Melody Tham Cheng Yee; M/s Raj, Ong & Yudistra
For the 1st defendant - Alan Adrian Gomez, Merryn Lai & Georgsha Lim (PDK); M/s Tommy Thomas

Reported by Lina E

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JUDGMENT

Ahmad Bache J:

Introduction

[1] The plaintiff had filed a civil claim against Thomas Thomas also
B known as Tommy Thomas, formally appointed as the Attorney General/Public Prosecutor ("AG/PP") of Malaysia as the first defendant and the Government of Malaysia as the second defendant. However, the claim against the Government of Malaysia was eventually dropped with Tommy Thomas remained as the sole defendant.

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[2] According to the plaintiff, this suit is premised solely on the conducts and actions of the defendant/Tommy Thomas which essentially alleged that Tommy Thomas as the former AG/PP did not exercise his power for the authorised purpose but for his own agenda. He had allegedly interfered in the investigation and attempted to prejudice and suppress the plaintiff. That
D conducts/actions of Tommy Thomas have given rise to the following causes of action upon which the plaintiff had filed the suit for, as follows:

(i) Tommy Thomas has committed misfeasance in public office;

(ii) Tommy Thomas has maliciously used the legal process against Najib
E Razak to further political aims. (Malicious abuse of process or malicious process); and

(iii) Tommy Thomas was negligent and reckless in his duties as Attorney General.

F **[3]** *Vide* encl. 6, the defendant had made an application to move this court to strike out this suit/claims under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012.

[4] After hearing submissions by parties, this court had on 25 November 2022 allowed the defendant's application for striking out.

G **[5]** Dissatisfied, the plaintiff had filed a notice of appeal to the Court of Appeal.

[6] Herewith are the full grounds of this court's decision as earlier this court had given broad grounds of judgment only.

H **Facts Of The Case**

[7] The facts of the case as submitted by the plaintiff and also gleaned from the pleadings/statements of claims and submissions are as follows:

[8] The defendant was appointed as the Attorney General (AG) *cum*
I Public Prosecutor (PP) on 4 June 2018 by the Government of Pakatan Harapan under Tun Dr Mahathir Mohamed. (He resigned on 28 February 2020).

[9] As a Public Prosecutor, using his discretionary powers under art. 145(3) of the Federal Constitution, he had charged Najib Razak for 35 offences (under four cases) following the outcome of investigations conducted by the investigating agencies *ie*, the police/MACC. They are:

(i) the 1Malaysia Development Berhad ("1MDB") case;

(ii) the International Petroleum Investment Company ("IPIC") case;

(iii) the alleged abuse of power under the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act 2009") case; and

(iv) the alleged money laundering under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFPUAA 2001") case.

[10] It is the plaintiff's case that the conducts/actions of Tommy Thomas in so doing had triggered the three causes of action/torts raised against Tommy Thomas as mentioned earlier, as the ensuing paragraphs would show.

[11] The plaintiff also pleaded and argued that Tommy Thomas ("TT") had personally targeted or formed an opinion against the plaintiff even before he became the AG/PP, as early as in 2012. All these can be found in his memoirs/book: *"My Story: Justice in the Wilderness"* ("memoirs") that was published in January 2021. He said the following in his "memoirs" at p. 198:

> It was only a matter of time before I got myself entangled in litigation pertaining to the dishonest and fraudulent actions of 1MDB. I first heard the name Jho Low through my connection as lawyer for the Terengganu State Government. This would have been around 2008. Najib Razak became the sixth Prime Minister of Malaysia in April 2009. But he had become Finance Minister the previous year. Although Prime Minister and Finance Minister Najib, and Jho Low kept all things 1MDB close to their chest, there was much talk in the business and media worlds about the exposure of 1MDB to debts in billions of dollars. Hence, by 2012, I had received sufficient anecdotal evidence, particularly from contacts in the bond market, whom I got to know after my involvement in the *Pesaka* case, to realise that a massive fraud has been perpetrated ...

[12] In 2015, Tommy Thomas met with Tun Mahathir Mohamad who was very concerned about this 1MDB fiasco. Tommy Thomas narrated this in his memoirs and amongst others, he wrote at p. 229:

> … I was happy to discover that Tun had grasped the essential aspects of the scandal. My contribution to the discussion was to inform Tun that persons like Najib, Jho Low and other principal fraudsters, could not only be prosecuted, but civil proceedings could also be filed against all of them in order to recover proceeds of their fraudulent activities, provided there was sufficient evidence, Tun immediately saw the advantages of both criminal and civil proceedings.

[13] In 2016, Tommy Thomas wrote an article about Najib Razak/the plaintiff in an online news portal called Malaysiakini titled "*Grand larceny in 1MDB*" criticising and accusing the plaintiff of stealing funds from 1MDB. Amongst others he wrote:

> … US$731 million of corrupt money was credited into his personal account, and his stepson received US$238 million. In the eyes of the world he is a kleptocrat, and cannot stay in office. He must resign immediately.

[14] According to the plaintiff, upon his appointment as AG/PP by Tun Dr Mahathir on 4 June 2018, under the Pakatan Harapan Government, Tommy Thomas ("TT") made known to the public that his first priority is to study the 1MDB matter and institute criminal and civil proceedings against those who are involved in the alleged 1MDB scandal. This was what he said in his memoirs when asked by reporters immediately after holding the post of AG/PP at p. 223 of his memoirs: "The most important question was: what were my priorities? I had expected this question. My response was that I had three priorities. First, to study the 1MDB scandals from all angles, and to institute criminal and civil proceedings against the relevant persons, secondly, to review the lopsided contracts that the government had been saddled with; both international and local agreements. Thirdly, to advice on law reform; particularly to amend or repeal laws that had marred our legal landscape, and to enact better laws."

[15] Tommy Thomas had also alleged Najib Razak of being a criminal and acting in cahoots with one Low Taek Jho @ Jho Low, to enrich himself with funds belonging to 1MDB and money laundering.

[16] Najib Razak was then charged in court on the 35 charges, heard in the four cases mentioned earlier.

[17] Tommy Thomas' actions regarding the above four cases form the subject matter of this suit. The SRC International Sdn Bhd ("SRC") case was not included as part of the claims, even though the same was finalised at the Federal Court level whereby the conviction of Najib Razak was affirmed, and Najib Razak is now serving his prison sentence.

[18] The defendant in his supporting affidavit at encl. 9 amongst others averred that, he believed the plaintiff does not care whether his claims are with or without merit but to harass and intimidate him and also by reason of the malice the plaintiff holds against him for preferring the 35 charges (in four cases) against him, in spite of the discretionary powers under art. 145(3) accorded upon him.

[19] In this application, this court is called upon to decide as to whether the claims of the plaintiff that Tommy Thomas has committed misfeasance in public office, of malicious process and tort of negligence can be struck out under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012.

The Law On Striking Out

[20] Order 18 r. 19(1)(a), (b) and (d) of the Rules of Courts 2012 gives court the power to strike out the plaintiff's claim, if the defendant succeeded in fulfilling certain criterias.

Order 18 r. 19(1)(a), (b), (c) and (d) reads:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair Trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible under subparagraph (1)(a).

[21] An applicant/defendant applying for striking out can rely on any one or more than one sub-paras. (a) to (d). There is no law to say otherwise. For sub-para. (a), no affidavit evidence is admissible (see r. 19(2)). For other sub-paragraphs, *ie*, (b), (c) and (d), affidavit evidence should be admissible.

[22] The striking-out procedure is summary in nature. It should only be adopted when it is conspicuously clear that the claim on the face of it is obviously unsustainable, *ie*, the test is whether on the face of the statement of claim alone (*ie*, without looking at the affidavit evidence) whether the court is prepared to conclude that the cause of action is obviously unsustainable – (see *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 (FC)).

Definitions

[23] As the torts of misfeasance in public office, abuse of court process and also negligence are interconnected, they will be addressed together in this judgment. This court has taken cognisance that this is a striking out (interlocutory) application and not a trial of the main suit, where merits are the prime concern. Hence this court will not focus on the merits of the claims.

A *Definition – Misfeasance In Public Office*

[24] As set out by the Federal Court in *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 12 MLJ 1 by reference to the House of Lords' decision in *Three Rivers* [2003] 2 AC 1, the tort of 'misfeasance in public office' has the following elements:

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(i) an abuse of public power or authority;

(ii) by a public officer;

(iii) who either: (a) knew that he was abusing his public power or authority; or (b) was recklessly indifferent as to the limits of their public power or authority; and

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(iv) who acted or omitted to act either with: (a) the intention of harming the plaintiff (targeted malice); or (b) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff or a class of persons of which the plaintiff was one.

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[25] The plaintiff had offered an example of a Canadian case of *Roncarelli v. Duplessis* [1959] SCR 121, whereby Roncarelli, a restaurant owner, had sued the Attorney General of Quebec for revoking his liquor license. The Attorney General had consistently targeted Roncarelli because he was a Jehovah's Witness. The Supreme Court held that while a decision to grant or revoke liquor license was discretionary, that discretion cannot be exercised for other purposes. The court held:

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> ... the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute ... A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

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G **[26]** The court in that case held that the Attorney General's desire to financially ruin the plaintiff, qualifies as a form of targeted malice and hence has committed misfeasance.

Definition – Malicious Prosecution

H **[27]** This tort is new in Malaysia. It was introduced in the United Kingdom, where the police were found to be liable for procuring arrest maliciously and without reasonable cause. It is related to tort that occurred during police investigation and its distinct from the tort of malicious prosecution.

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[28] In essence, it also covers situation where the legal process was abused. For example, the suspect was charged to make him undergo the rigorous process of a protracted trial or a suspect was charged for a collateral purpose or it may be to merely commence an action and let it hang over the head of the defendant with no intention of bringing it to a conclusion.

> See: *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425, at p. 438.

Definition – Negligence

[29] *Black's Dictionary* defines "negligence", as:

> The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or wilfully disregardful of others' right.

Analysis And Finding Of This Court

[30] In this application, the defendant/Tommy Thomas (TT) argued rigorously that these claims should be struck out as there was no cause or no reasonable cause of action and hence it was conspicuously clear that the claim on the face of it is "obviously unsustainable". This is because Tommy Thomas as the Public Prosecutor was conferred a wide discretion and hence enjoys immunity from any proceedings against him. Further, the plaintiff's claims are scandalous, frivolous, vexatious and an abuse of the court's process. The three causes of action as mentioned earlier are misfeasance in public office, malicious abuse of process (malicious process) and negligence/reckless all of which relate to the defendant's exercise of his discretion to prefer the 35 charges against the plaintiff in the four cases. The plaintiff argued with equal rigor amongst others' that their main claim against Tommy Thomas was about the various conducts and actions of Tommy Thomas which amongst others are oppressive and prejudicial to the plaintiff.

[31] This court had perused all the cause papers (pleadings/SOC/affidavits *etc.*) and had heard submissions of both parties. This court will now analyse whether those conducts/actions of Tommy Thomas have given rise to the three causes of action and at the end of the day, can the same be struck out.

Analysis

[32] The torts of misfeasance in public office, the tort of malicious process and the tort of negligence envisage a situation whereby someone like Tommy Thomas holding a public office acted outside the power granted to him (*ie*, abuse) and in discharging his public duties had acted in bad faith with targeted malice and had breached the duty of care by not acting reasonably, professionally but intentionally or wilful disregard of other's rights. In this case, the plaintiff pleaded that Tommy Thomas whilst holding his public

office as the Public Prosecutor/Attorney General had committed the three torts by, amongst others, prejudged the plaintiff and had preferred the 35 charges against him with bad faith, did not study the case against him independently and objectively, and had interfered with the investigation.

[33] This court had heard the submissions by both parties at length and made the following analysis and findings as follows:

No Cause Or No Reasonable Cause Of Action And Hence The Claim Was Obviously Unsustainable – Rule 19(1)(a)

[34] Cause of action essentially is a statement of fact alleging that the plaintiff's rights have been affected by the defendant's action. As we will see, the issues/claims here involved the discretionary powers vested in the defendant in discharging his official duties that involved the plaintiff.

[35] First and foremost, it is trite that under art. 145(3) of the Federal Constitution, the Attorney General/Public Prosecutor was conferred the power to exercise at his discretion to institute, conduct or discontinue any proceeding for criminal offences. See also s. 376 of the Criminal Procedure Code ("CPC").

[36] Put it in another way, under art. 145(3), the Attorney General/Public Prosecutor has the power to charge any person, to reduce the charge, to increase the charge or withdraw the charge against any person already charged. There are many lines of high authorities that confirmed such powers of the Public Prosecutor and that they are not justiciable. It follows that, except for the recent decision in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209, such discretion whether or not to prosecute cannot be made a subject matter of any proceedings in our court. As the discretion of the Attorney General/Public Prosecutor is almost unfettered, this court ruled that the causes of action for malfeasance, malicious process and negligence do not arise in the first place. This position of the law can be clearly seen in the long line of high authorities as can be gleaned below:

[37] In *Long Samat & Ors v. PP* [1974] 1 LNS 80; [1974] 2 MLJ 152, the Federal Court said: "In our view the clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions". In the case of *Johnson Tan Han Seng v. PP* [1977] 1 LNS 38, Suffian LP confirmed and reiterated the powers of Public Prosecutor under arts. 145(3) of the Federal Constitution and also held that art. 8 (the rights of an individual to be treated equally) are still subject to art. 145(3) and not the reverse.

[38] In *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, Haidar FCJ dismissed the appellant's contention of vexatiousness or oppressiveness on the part of the Attorney General in preferring charges. The Federal Court held:

In view of our decision that the Ordinance continues in force, *the question of oppression or vexatiousness on the part of the Attorney General by mounting a Prosecution against the appellant for offences under the Ordinance does not arise. This is a matter entirely within the discretion of the Attorney General under art. 145(3) of the Constitution to prefer any charges for offences under any law he deems fit, depending on the facts of the case and taking into account the public interest element into consideration (Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544).* (emphasis added)

[39] In *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289; [2014] 6 MLJ 831, referred by the defendant, Raus Sharif PCA (as His Lordship then was), reiterated a caution on relying on English common law, where unlike in England, the Federal Constitution of Malaysia is the supreme law of the land:

[28] In this regard it is appropriate to recall the reminder by the Supreme Court in Karpal Singh v. Public Prosecutor of the constitutional consequences of relying on the English concept of common law (one of which is the concept of inherent jurisdiction of the courts). The Supreme Court cautioned that, *unlike UK, the Malaysian Federal Constitution which is a written law, is specifically declared to be the supreme law of the land, and that the UK has no criminal procedure code as that enacted by our legislature ...*

> Perhaps it is appropriate that we now pause to consider the constitutional consequences of relying on the English common law concept. Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our legislature. *For our immediate purpose we wish to refer to art. 145 (3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the courts.* The reasoning and logic behind such contention is well illustrated in the case of *Public Prosecutor v. Lee Tin Bau* [1985] 1 MLJ 388, *Long bin Samat & Ors v. Public Prosecutor* [1974] 2 MLJ 152, *Public Prosecutor v. Datuk Harun bin Haji Idris and Ors* [1976] 2 MLJ 116 and *Poh Cho Ching v. Public Prosecutor* [1982] 1 MLJ 86. (emphasis added)

[40] In the Supreme Court of *Johnson Tan Han Seng & Other Appeals v. PP* [1977] 1 LNS 38 (*supra*) Suffian LP defined discretion as liberty of deciding one thinks fit.

[41] The most recent development in respect of the justiciability of art. 145(3) is the Federal Court's decision in *Sundra Rajoo*. However, this court agreed with the defendant that *Sundra Rajoo*'s decision did not alter the position of the unfettered discretion of the Attorney General, more so the issue is different in that whether *Sundra Rajoo* as a high officer of the KLRCA has immunity from prosecution or otherwise, as a suspect. Here it is very clear that the Attorney General/Tommy Thomas has the immunity from

being sued by virtue of the discretion granted to him by art. 145(3) of the Federal Constitution. The decision in *Sundra Rajoo* however, only opened the avenue of judicial review. Even so, the Federal Court held that it is only in rare and exceptional cases that the decision may be judicially reviewed.

[42] As the superior courts have consistently held that the exercise of the Attorney General's discretion under art. 145(3) is non-justiciable, with *Sundra Rajoo* only opened the avenue for judicial review in "rare and exceptional cases", this court ruled that the plaintiff's tortious claims of 'misfeasance in public office', 'malicious process', and purported infringement of his rights under art. 8 of the Federal Constitution, and the claim of negligence all of which relate to the defendant's exercise of his discretion as Public Prosecutor, to prefer charges under art. 145(3), ought to be struck out for having no cause or no reasonable cause of action to begin with, and are therefore obviously unsustainable – see O. 18 r. 19(1)(a). (It bears mention here that the judicial review was exceptionally allowed in *Sundra Rajoo* because the charges preferred against him were held to be in breach of the International Organizations (Privileges and Immunities) Act 1992 (Act 485)).

[43] In the English case of *Law v. Llewellyn* [1987] 1 KB 487, a Justice of Peace ("JP") who heard a criminal case in a petty Session's Court had made a defamatory statement. He was sued by Law, the plaintiff. It was held that a defamatory statement made by the Justice of Peace in the course of the proceedings cannot be actionable against him (JP), as he was protected under the law.

[44] Similarly in Malaysia, in a case of a Magistrate being sued for anything done in the course of the proceedings, he can apply to strike out the claim because of the protection accorded to him under s. 107 of the Subordinate Courts Act 1948 as there was no cause of action. Likewise in the present case, as Tommy Thomas are protected and are immune from any proceedings by virtue of the discretionary powers accorded to him, the plaintiff's claim should be struck out as there was no reasonable cause of action, to begin with.

[45] To not allowing the claims to be struck out will be akin to not recognising the discretionary powers granted by the Federal Constitution, which is the supreme law of the land and going against the spirit of that special article. As there exists no cause or no reasonable cause of action, the claims should be struck out.

[46] It is imperative to note that Tommy Thomas did issue the consent and also did conduct the prosecution of the plaintiff in the SRC International Sdn Bhd's case (SRC) *albeit* at the initial stage (as confirmed by parties). It bears mention here that the SRC case was deliberately excluded in these claims by the plaintiff but was not explained when the issues involved the same

relationship between the plaintiff and the defendant. Be that as it may, the plaintiff was found guilty by the High Court Judge, and was affirmed by the Court of Appeal and the Federal Court and he is now serving his jail term. That decision is a testimony and manifestation of the fact that Tommy Thomas had made the right decision to charge the plaintiff in good faith based on the strength of the evidence gathered and was not reckless or negligent or commit the tort of malfeasance or malicious process and in so doing, and by extension, was right in preferring the 35 charges in the four cases against the plaintiff.

[47] As striking out under this sub head (O. 19(1)(a)) is dependent upon the pleadings of the plaintiff, this court observed that the pleadings and statements of claims themselves did not reveal sufficient details *ie*, were vague, devoid of material facts, substance and particulars. For example, it did not explain when, how and what Tommy Thomas did that had given rise to the three causes of action of misfeasance in public office, malicious process and negligence against the backdrop of the discretionary powers conferred upon him by the Federal Constitution.

[48] Instead the statements of claims were filled with unconnected political issues such as Pakatan Harapan and Dr Mahathir and PH's manifestos, to name a few. The plaintiff also alleged that the defendant interfered or obstructed investigations but failed to give particulars as to how it was done, for example, through coercion of witnesses or forging of evidence. Hence, the plaintiff failed to provide cogent materials to anchor his assertions to support his claims.

[49] The pleadings also failed to state how Tommy Thomas had deliberately acted beyond his powers with malice *eg*, "had deliberately targeted the plaintiff or had acted under instruction of the Pakatan Harapan Government". The plaintiff surprisingly also did not plead that his trials in the four criminal cases have already been compromised because of the defendant's actions.

[50] The plaintiff also failed to state why and how the prosecution of the 35 charges (in the four cases) were not in accordance with the law. Instead, it was full of narratives of his official acts and conducts in discharging his official duties, when as a Public Prosecutor it was the defendant's public duty to prosecute the plaintiff after the investigating agencies had provided him with all the necessary evidence following thorough investigations that revealed the plaintiff's involvements in all the 35 charges.

[51] On the contrary, Tommy Thomas would be failing in his duties as Public Prosecutor if he failed to charge the plaintiff for those offences. As all man are equal before the law, he is to ensure that the plaintiff did not escape the long arms of the law with impunity, just like anyone else when there was overwhelming evidence to prefer charges against him. It is undisputed that

Tommy Thomas was then a government servant Attorney General and hence like any other government servant, is neutral and discharges his duties independently.

[52] Hence the issue of selective prosecution or Tommy Thomas had preferred charges against the plaintiff under Pakatan Government's instruction do not arise. The fact that he has given his views regarding the plaintiff's culpability even before he becomes the AG/PP is immaterial as at that point of time, as a public-spirited citizen, the defendant was concerned of those on-goings in the country especially on corruption. Further, the medias be it local or international, had already discussed and voiced their concern on the plaintiff's purported involvements of the matter especially the 1MDB fiasco that involved billions of ringgit.

[53] In fact, what was significant in the pleadings/statements of claim was that the plaintiff was misconceived when he averred that the defendant was involved in the investigations of all the charges in the four cases when the law is trite that the AG/PP has no power to investigate or no power in the investigation process (see encl. 9) and that the defendant did not even conduct the trials as the trials of those 35 charges were still pending/have not started and that the defendant had resigned/retired on 28 February 2020, before this suit was filed. (This will be discussed later).

[54] Consequently, the pleadings therefore failed to disclose any cause/s of action by virtue of the discretionary powers conferred upon the defendant under art. 145(3) of the Federal Constitution in the first place and that the defendant did not conduct the prosecution of the four cases.

[55] For the aforesaid reasons, this court ruled that there was no cause or no reasonable cause of action as the pleadings did not reveal any reasonable cause of action. Consequently, this is a plain and obvious case where on the face of it, the claims are obviously unsustainable and should be struck out under r. 19(1)(a).

[56] That the Public Prosecutor or Tommy Thomas did not commit the three torts can be further seen in the various processes of bringing one to justice which is rigorous and that the Attorney General/Public Prosecutor has to undergo several stages. It entails a somewhat "built in check and balance" procedure/mechanism, which will not cause or will never cause Tommy Thomas to commit the tort of misfeasance, malicious process and negligence.

[57] Towards that end, the submission by the plaintiff that the Attorney General is the most powerful person by virtue of his power under art. 145(3) and that he holds the plaintiff's liberty is untenable and cannot hold water. This built-in "check and balance" procedure/mechanism will dispel that nation and will show that, at the end of the day, the fate of the plaintiff will

be determined by the courts and not Tommy Thomas as the Public Prosecutor. It actually hinges on the strength of the evidence adduced (which was earlier gathered by the investigating agencies independently) by the Public Prosecutor before the trial judge as the following would show:

The First Stage: (At The Investigation Level)

[58] The lodging of a police report *vide* s. 107 of the CPC or the MACC Report *vide* s. 29 of the MACC Act by a complainant will propel a criminal investigation by the respective agencies. An investigation paper will be opened with an investigating officer ("IO") appointed. Statements of witnesses will be recorded under s. 112 of the CPC or under s. 30 of the MACC Act to the satisfaction of the investigators which should reveal evidence that are sufficient enough for the Public Prosecutor to identify and prefer charge/charges against the suspect. If the investigation failed to produce any strong evidence, the investigation of the case will be closed (NFA). However, it can still be reopened later. It is germane to note that at this juncture, the Public Prosecutor has no role to play as he has no power to investigate.

The Second Stage: (At The Attorney General/Public Prosecutor Level)

[59] The investigation paper/s from the police/MACC that contained the evidence collected from the investigation/s, will be submitted to the Attorney General/Public Prosecutor who will study the full contents of the investigation paper/s. It is not uncommon for the investigation papers to be resent to the investigating agencies for further evidence gathering if the Public Prosecutor feels that the investigation by MACC/police was still incomplete as in this case. This is because the Public Prosecutor/Deputy Public Prosecutor cannot investigate or get involved in the investigation, but will direct the agencies to further investigate to gather further evidence, sufficient enough (*prima facie* threshold) to prefer charge/charges against the suspect. In the case of *Johnson Tan* (*supra*), the court recognised that the Public Prosecutor is always in touch with the investigating agencies and have information not available to the court. If the Public Prosecutor are satisfied with the evidence so far gathered, he will give the approval by issuing "consent" to prefer charge/s against the suspect.

[60] The Court of Appeal in the case of *Dato' Sri Mohd Najib Hj Abd Razak v. PP* [2022] 6 CLJ 27; [2022] 3 MLJ 656 through Abu Bakar Jais JCA had recognised that the Public Prosecutor was not involved in the investigation of the plaintiff here. "At most he can request the relevant agencies to carry out further investigation".

The Third Stage (In The Safe Hands Of The Court's Jurisdiction)

(See chapter XX of the CPC and *Mallal's Criminal Procedure* – 7th edn at pp. 385 to 397):

[61] *Vide* s. 178 of the CPC, the suspect will then be brought into the safe hands of the court's jurisdiction where he will be charged by the Public Prosecutor in a court of law (note that by virtue of the doctrine of separation of powers, the Judiciary is independent of the Public Prosecutor/Executive). The courts in Malaysia practice the strict adversarial system. Under this system, once charged in the course of the criminal proceeding, the Public Prosecutor/Deputy Public Prosecutor has to prove the case against the accused beyond reasonable doubt. (See s. 182A of the CPC). The accused need not have to prove that he did not commit the offence which is the strict duty of the Public Prosecutor but will just need to raise a reasonable doubt. Such is the heavy burden imposed on the Public Prosecutor to earn a conviction on the accused. Meanwhile the accused stands innocent until proven guilty.

[62] In terms of evidence, the court only admits evidence that are permitted by the Evidence Act, an Act that controls the admission and rejection of evidence under the "best evidence" rule. Evidence must be direct. Hearsay evidence are not admissible, even though countless allegations had been made in the local and international medias about the plaintiff's involvement in corruption *vis-à-vis* the 1MDB fund, unless there are exceptions granted by law. The Public Prosecutor therefore will call witnesses who are credible whose veracity and credibility will be tested through cross examinations by the defence/defendant. Any benefit arising from any doubts must be given to the accused and not to the Public Prosecutor/defendant, in this case, to the plaintiff.

The Fate Of The Accused Will Be In The Hands Of The Trial Judge, Not The Public Prosecutor

[63] Lest we forget, all these proceedings will be conducted before a qualified judge. Under the adversarial system, in Malaysia a judge will preside over the proceeding without the assistance of any jurors, who are laymen. Malaysia has abolished the trial by jury system to ensure that the fate of the accused will not be determined by jurors (laymen) and the Public Prosecutor but by a professional and qualified judge. To borrow the description accorded to a judge, Richard Malanjum CJSS (as he then was) in the case of *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 4 CLJ 705 had this to say regarding judges:

> [35] A judge is a legally-trained individual who decides the case on the merits based on the law as applied to the facts. In determining the outcome of a matter, he or she is a dispassionate arbiter who takes into account only relevant considerations. A judge cannot be compared to a layman juror. He or she is not easily swayed by irrelevant information. Also, if a trial judge commits an error of law or fact, that decision is entitled to be impugned and subsequently corrected on appeal.

[64] Lord Denning in *R v. Horsham Justices, ex parte Farquharson and Anor* [1982] 2 AII ER 269 said at p. 286:

> … at a trial, judges are not influenced by what they may have read in the newspapers ... They are good, sensible people. They go by the evidence that is adduced before them.

[65] In the event, if an accused was found guilty and not satisfied with the decision of the trial judge, he can lodge an appeal to the Court of Appeal and thereafter to the Federal Court.

[66] Further, the judiciary always ensures that judges discharge their duties without fear or favour, not beholden to any one and always abide by the rule of law and be committed to their oath of office. Hence judges are not biased in dispensing their judicial duties.

[67] As can be seen above, at the risk of repetition, because of the rigid process in our criminal justice system, with an inbuilt "check and balance" mechanism/procedure, the fate of the person charged (the plaintiff here) is not dependent on the acts or conducts of the Public Prosecutor, (Tommy Thomas/defendant) here but on the strength of the evidence adduced before the trial judge. Lest we also forget, here the defendant did not even conduct the trial of the four cases, and that the trials have not started/still pending (as confirmed by parties) and that Tommy Thomas had already retired/ resigned and those four cases remain pending at the time this suit was filed.

[68] In fact, the defendant in his affidavit to the application had also averred that he was merely discharging his public duties in good faith within the powers conferred upon him as an Attorney General/Public Prosecutor and hence did not commit the three torts.

[69] Given the situation above, again this court ruled that the issue of Tommy Thomas committing the torts of misfeasance, malicious process and negligence is devoid of any merit and a non-starter. Hence with respect, the plaintiff's claims against the defendant was eminently one that was plainly unsustainable and have no chance of success. Put it in another way, the claims should be struck out for having no cause or no reasonable cause of action to begin with, as the claims are obviously unsustainable – see O. 18 r. 19(1)(a).

The Claim Was Scandalous, Frivolous Or Vexatious – Order 18 r. 19(1)(b)

[70] It is germane to note that this application to strike out was made not only under r. 19(1)(a) but also under r. 19(1)(b) and (d) of the Rules of Court 2012 as well, hence the court is not confined to a mere perusal of the averments in the statements of claim/pleadings but to the affidavits as well (see *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman & Ors* [1996] 3 CLJ 695; [1996] 3 MLJ 259; *Domnic Selvam S Gnanapragasam v. Kerajaan Malaysia & Ors* [2006] 8 CLJ 114; [2007] 2 MLJ 761; *Malayan United Finance Bhd*

v. Cheung Kong Plantation Sdn Bhd & Yang Lain [2000] 2 CLJ 601; [2000] 2 MLJ 38; *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16).

[71] Essentially, "scandalous" means "wholly unnecessary and irrelevant", not just unpleasant allegation but it casts imputation and is completely unnecessary. Frivolous action is one that are groundless and with little prospect of success. Vexatious means to annoy, oppress or harass a litigant, it lacks *bona fide* and is hopeless.

[72] It is trite that a pleading is frivolous or vexatious when it is obviously unsustainable. (See *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad* [2007] 5 CLJ 118; [2007] 5 MLJ 406; *Godrej Sara Lee Ltd v. Siah Teong Teck & Anor* [2007] 10 CLJ 255; [2007] 7 MLJ 153).

[73] From the outset, this court observed, based on the pleadings and the affidavits, the plaintiff's claims were not well founded and in fact, misleading and hence the claims were frivolous, scandalous and vexatious and should be struck out. This was because the plaintiff had averred that Tommy Thomas had deliberately targeted the plaintiff and without proper investigation had charged the plaintiff.

[74] This the plaintiff had failed to explain and to plead sufficiently. As alluded to earlier, it was the duty of the defendant to charge the plaintiff as the Public Prosecutor and the issue of "targeting the plaintiff or targeted malice" did not arise. Furthermore, the defendant as Public Prosecutor did not arbitrarily charge the plaintiff in bad faith but only upon receiving completed investigation papers from the investigating agencies. Only upon studying and satisfying himself of the evidence gathered did he issue the consent (see defendants' affidavit in support in encl. 9). In the case of *Abdul Hamid v. PP* [1956] 1 LNS 3; [1956] MLJ 231, the court ruled that since "Consent" is an act of reasons, it presupposes that the Attorney General had acted reasonably "accompanied with deliberation, the mind weighing, the good and evil on each side".

[75] The plaintiff also submitted that Tommy Thomas owes a duty of care to the plaintiff and was negligent and reckless in preferring all the 35 charges in the four cases against him. This court ruled that the only duty he has towards the plaintiff is to act professionally, reasonably and not arbitrarily in charging the plaintiff, as alluded to earlier whereby he acted based on the positive outcome of the results of the investigations in the various investigation papers and only then did he issue the consent.

[76] Further, logic dictates that the other reasons to charge the plaintiff was to prove ultimately that the plaintiff was guilty of the charge preferred against him. This is entirely legal and a proper use of criminal process for the very

purpose it was designed. There was nothing unlawful. It was also an opportunity and an avenue for the plaintiff to defend himself. There is no improper use of the criminal procedure in the court of law.

[77] Hence, this court ruled that the defendant did not commit the tort of negligence. The plaintiff had quoted a passage in *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) to suggest that the defendants had committed the tort of negligence:

> A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it.

[78] The plaintiff also submitted the case of *R v. Banks* [1916] 2 KB 621 p. 623, where the court ruled that a prosecutor's duty is to conduct a case fairly and must never press for a conviction. The plaintiff also cited the Singapore's Court of Appeal's case of *Muhammad Kadar v. PP* [2011] 3 SLR 1205 where, amongst others, it was held that it is the prosecutor's duty to assist the court in coming to the correct decision.

[79] Evidently, authorities submitted by the plaintiff above regarding the issue of negligence also seems to support the proposition that for a tort of misfeasance and malicious process to exist, the defendant must have also conducted or involved in the prosecution/proceeding until the conclusion of the trial.

[80] However, in the present case, at the time when this suit was filed in 2021 the prosecution of the 35 charges in the four cases have not started or/and are still ongoing or pending and the defendant/Tommy Thomas had already retired/resigned on 28 February 2020. Hence, he was not and will not be involved in the conduct of the proceeding/s of the 35 charges in the four cases in the first place, and that there was no final determination on the four cases as yet.

[81] With those findings above, it follows that all the ingredients of the purported three torts were negated and hence the defendant did not commit all the three torts. Consequently, not only were the claims not well founded and should be struck out under r. 19(1)(b), as they are frivolous, scandalous and vexatious, but also there was no reasonable cause of action in the first place and a nonstarter resulting in the claims being rendered obviously unsustainable and should be struck out under r. 19(1)(a) too.

[82] As an illustration, this court would like to compare and contrast the present case with the Canadian case of *Roncarelly* (*supra*) referred to by the plaintiff earlier whereby the Attorney General who conducted the trial did

not act professionally, reasonably, fairly and had blatantly made Roncarelly the target and deliberately wanted to ruin his businesses. That case draws no parallel to the present case here and is distinguishable.

[83] Another requirement is that the prosecution of the cases must have ended in acquittals. Here, that would never happen as the four cases are still pending/just started/ongoing with Tommy Thomas no longer being the Attorney General/Public Prosecutor. Consequently, the plaintiff's guilt on the four cases has not been determined. Again, these claims were hence frivolous, scandalous and vexatious and should be struck out under O. 18 r. 19(1)(b) of the Rules of Court 2012. Further, it was an abuse of the court's process – see O. 18 r. 19(1)(d).

[84] Further, to accede to the proposition that Tommy Thomas has committed all the three torts/causes of action in spite of his powers, will also open the flood gate whereby all actions of the Public Prosecutor will be questioned *ie*, opened to public scrutiny, hence challenging the almost unfettered discretion conferred upon him under art. 145(3) of the Federal Constitution and also his Deputies (DPPs), to discharge their duties without fear or favour. Consequently, his DPPs too will be afraid of preferring charges against suspects even though there were over-whelming evidence, due to the risk of opening themselves up to civil suits subsequently. Hence, this will potentially lead to a significant escalation of criminal activities in the country.

[85] Worst of all, it will invite an accused person to file a claim against the Public Prosecutor even before the proceeding commences or before they have been acquitted like the present case before this court. This will obviously cause havoc and our criminal justice system will dangerously be in jeopardy. The Public Prosecutor and his DPPs will then have to come to court in a full trial to testify and to explain for each case, wasting his official time and public funds and seriously undermining the integrity of the institution of the Attorney General/Public Prosecutor altogether. This is against public policy and in total contravention with established procedural laws and the Criminal Procedure Code. Hence, this should not be allowed and the claim should be struck out as it is frivolous, scandalous and vexatious.

[86] It will also set a bad and dangerous precedent whereby an accused person can file a claim against the Attorney General/Public Prosecutor for every acquittal.

[87] As it stands, the plaintiff had unnecessarily raised the following questions, amongst others, (i) did the defendant make up his mind to prosecute the plaintiff before he was appointed as Attorney General/Public Prosecutor?; (ii) did he interfere in the investigation of the plaintiff?; (iii) did

he consider the investigation paper against the plaintiff objectively and is this claim obviously frivolous, scandalous and vexatious? To allow these claims will potentially open the flood gates and these queries will be the potential questions posed against the Public Prosecutor/Attorney General for every charge preferred against a potential accused before the proceeding commences or before the accused being acquitted or after the accused was acquitted and this should not be allowed.

It Is Otherwise An Abuse Of The Court's Process (Rule 19(1)(d))

[88] This court was of the considered opinion that the act of the plaintiff in filing these claims can be seen as a collateral attack on the prosecution of the 35 criminal charges in four criminal cases against him. This is because the plaintiff is prematurely launching a civil action based on criminal charges which have yet to be determined in the criminal courts. This is in itself an abuse of the court's process as to allow these claims might give rise to potentially allowing the four criminal cases to be tried in civil court on a civil balance of proof. This court further opined that this claim should not be filed at all, before the trials of the four cases are completed. It is akin to putting the cart before the horse. It has also created confusion and a transgression of jurisdictions between the civil and criminal court's jurisdiction and this should not be allowed at all cost. Hence, to put it in another way, this application is premature and an abuse of the court's process and hence the claims should be struck out *ab initio* under r. 19(1)(d). To allow these claims will also go against public interest and public policy as alluded to above.

Conclusion

[89] In essence, this court ruled that it is conspicuously clear that the plaintiff's claims on the face of it are obviously unsustainable as there was no cause or no reasonable cause of action existed in the first place.

[90] That the cause of action of misfeasance in public office and the allegations of malicious process together with negligence will never arise in Tommy Thomas's case as firstly, because of the discretionary powers and the protection accorded to him and that the charges were not preferred arbitrarily but based on the strength of the evidence gathered from the independent investigations conducted by the investigating agencies. (See the defendant affidavit at encl. 9). Further, the process of bringing anyone like the plaintiff/suspect to justice will have to go through several stages within our criminal justice system (as explained earlier) whereby the fate of an accused will be determined not by the defendant/Public Prosecutor but by the court based on the evidence adduced and the Public Prosecutor/himself enjoys immunity by way of discretion granted to him by the Federal Constitution under art. 145(3) in the first place.

[91] Further, this court is of the considered opinion that the causes of action of misfeasance in public office and the so-called malicious process are not sustainable and a non-starter because Tommy Thomas did not even conduct/take part in the prosecution of the four cases as the same are still pending or not even started when Tommy Thomas retired/resigned on 28 February 2020 and when this suit was filed in 2021. As a result, even at the time when the decision of this court was delivered on 25 November 2022, there was an absence of a final determination on the 35 charges in the four cases which further weakened the plaintiff's claims, on the three causes of action as the same requires an element that the four cases must have concluded in an acquittal.

[92] It follows that even if Tommy Thomas have had an agenda against the plaintiff (which this court disagreed), he would not be conducting the prosecution of the plaintiff. Hence, how could he be said to have had committed misfeasance and the other torts. Even the pleadings themselves as alluded to earlier did not reveal any reasonable cause of action. In fact, all these allegations of the three torts can be raised as defences in the 35 criminal charges in the four cases. Consequently, the claims against the defendant are obviously unsustainable and should be struck out.

[93] Counsel for the plaintiff also submitted that as there are complex questions of law involved, hence this claim cannot be dismissed summarily. It is trite that even on the face of it there seems to have some complex questions or some complexities and that many affidavits evidence were adduced, it is no justification for not to allow the claims to be struck out when there was no cause or no reasonable cause of action existed in the first place and that the Public Prosecutor enjoyed immunity from any proceedings and that there was no chance of success.

[94] Hence it follows, that there was no necessity for these claims/suit to go for a full trial and no reason for Tommy Thomas to come to court to explain, as the claims should be struck out *ab initio*.

[95] This court also ruled that, the stance taken by the succeeding Attorney General *ie*, Tan Sri Idrus Harun in not withdrawing the 35 charges in the four cases above but instead pursuing them further also lends credence to the defendant's decision to charge the plaintiff for the same, dispelling the notion that the defendant had some political and personal agenda against the plaintiff when he preferred the 35 charges as Idrus Harun was not appointed by the Mahathir government.

[96] Premised on the foregoing reasons, the defendant's application *vide* encl. 6 was hence allowed with costs of RM12,000.